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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 132

DON WILLIAMS, *Appellant,*

v.

THE CITY OF WICHITA, KANSAS, *Appellee.*

Appeal from the Supreme Court of the State of Kansas

APPELLANT'S REPLY TO MOTION TO DISMISS

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September 4, 1963.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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By its failure to acknowledge, much less discuss, the two federal constitutional questions presented in the Jurisdictional Statement, the Motion to Dismiss in effect recognizes the substantiality and the unprecedented nature of those questions. On the other hand, the questions which Appellee says are insubstantial are those which are framed for the first time by the Appellee itself in the Motion to Dismiss, pp. 1-2, ques-

tions which differ materially from the two set forth in the Jurisdictional Statement. A mere comparison of the two sets of questions demonstrates that Appellee is talking about an entirely different case than that submitted to this Court in the Jurisdictional Statement:

Questions presented in Jurisdictional Statement:	Questions presented in Motion to Dismiss:
1. Whether the Water Appropriation Act of Kansas, construed and applied so as to deny just compensation to a landowner whose common law right to use underground water to irrigate his crops has been destroyed, is consistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution.	1. Whether a state statute, enacted to prevent the exploitation or waste of water, denies a property owner due process and equal protection of the law under the Fourteenth Amendment to the United States Constitution when it establishes a procedure for the determination of rights and the payment of any compensation lawfully due?
2. Whether the Water Appropriation Act of Kansas, construed and applied so as to create a classification for just compensation purposes that discriminates against and denies compensation to a landowner who uses natural rather than artificial irrigation methods, is consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.	2. Where the City of Wichita has a permit under this statute to appropriate underground water is a property owner entitled to an injunction ordering the City to abandon its statutory permit and to proceed by contract and condemnation?

Even if the questions asked by the Appellee were to be answered in the negative, the questions presented in the Jurisdictional Statement remain both substantial and unanswered. The Motion to Dismiss is therefore misdirected and should be denied or ignored. See *Alton R. Co.* v. *Illinois Commission,* 305 U.S. 548, 550; *Milheim* v. *Moffat Tunnel District,* 262 U.S. 710, 716-717.

However, there are certain matters discussed in the Motion to Dismiss which warrant a brief reply because of their misleading nature:

1. The Alleged Failure to Exhaust Certain Procedures Under the Water Appropriation Act Was Not a Basis of the Decision Below and Hence Cannot Defeat This Court's Jurisdiction or Render This Appeal Insubstantial

The claim is made in the Motion to Dismiss, p. 12, that Appellant's failure to exhaust prescribed procedures and remedies under the Water Appropriation Act "makes this appeal insubstantial and is grounds for dismissal."

The short and complete answer is that the Kansas Supreme Court explicitly based its decision upon a determination of federal constitutional issues and made no effort to rest its judgment on any failure to exhaust administrative or judicial procedures under the Act. The Kansas court said in plain language that "the constitutionality of the Act is actually the single decisive issue of the case." 190 Kan. at 319. See also that court's own syllabus at p. 317.[1]

As this Court said in *Rogers* v. *Hennepin County*, 240 U.S. 184, 188-189, in words fully applicable to the instant appeal, "It is well settled that where the state court does not decide against the . . . [Appellant] upon an independent state ground [such as the failure to exhaust some other state remedy], but, deeming the Federal question to be before it, actually entertains it and decides it adversely to the Federal right asserted, this Court has jurisdiction to review the judgment,

[1] Under Kansas law, the syllabus is written by the Justice delivering the opinion and "shall be confined to points of law arising from the facts in the case that have been determined by the court." Kan. Gen. Stat. 1949, § 60-3329.

assuming it to be a final judgment, as it is here." See also *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192, 197, n. 1; *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 98; *International Steel Co.* v. *National Surety Co.*, 297 U.S. 657, 666; *Grayson* v. *Harris*, 267 U.S. 352, 358.

Indeed, the decision that was rendered on the basis of the federal constitutional matters, a decision that denied the existence of any vested property right of the Appellant, was so sweeping in scope as to render fruitless any suggestion that some form of relief under the Act might now be available to assert and protect that property right.[2]

2. This Court's Affirmance of the Baumann Case, 352 U.S. 863, Did Not Involve Any Ruling on the Federal Constitutional Issues Emerging from the Interpretation of the Water Appropriation Act Made by the Kansas Supreme Court

The suggestion is advanced in the Motion to Dismiss, p. 14, that no substantial federal question is presented "by the contention of invasion of constitutional right, where the question raised has already been settled by previous decisions of this Court." Reference is made in this respect to *Baumann* v. *Smrha*, 352 U.S. 863, where this Court summarily affirmed the judgment of a three-judge federal district court, 145 F. Supp. 617 (D.C. Kan.).

The federal district court in *Baumann*, however, had done no more than *assume* that the Kansas Water

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[2] Thus the Kansas court, in the course of passing upon the federal constitutional issues, authoritatively eliminated from the statutory definition of "vested rights" any form of beneficial use of underground water by natural (as distinguished from artificial) processes. 190 Kan. at 334-335. Such an interpretation would, of course, be controlling in any future proceeding in Kansas under the Act.

Appropriation Act gave protection "to valid existing vested rights and to prior appropriations" (145 F. Supp. at 624) and that the Kansas courts, which had not yet spoken, would implement that protection.[3] The affirmance of that decision by this Court was premised upon motions to affirm which expressly emphasized this aspect of the lower court determination. The *Baumann* case can therefore be read as but a hopeful prediction that vested rights, such as those asserted by the Appellant, would receive adequate protection under the Act.

That prediction, however, has not been borne out. The Kansas Supreme Court has now made it clear for the first time that the beneficial use of underground water by natural processes is not a "vested right" within the meaning of the state statute and hence the destruction of such an interest creates no right to just compensation.

The federal constitutional issues that now emerge from this authoritative gloss upon the Act were not, and could not have been, involved in the *Baumann* litigation. Not until the Kansas Supreme Court spoke did it become clear that the natural beneficial use of underground water was not a vested and protectible property right under the statute; not until the decision below was rendered was it possible to say that the Act intended to create a discrimination as between the natural users and the artificial users of underground water. The federal constitutional implications of those

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[3] The federal district court made no effort to define "vested rights" under the Act or to determine if the beneficial users of underground water by natural processes possessed "vested rights." Such matters necessarily had to await the authoritative ruling of the Kansas Supreme Court in the instant case.

authoritative determinations were not possible to assess until the determinations were actually made. And since they had not been made when the *Baumann* case came before this Court, the affirmance can constitute no controlling precedent on the constitutional issues now at stake.

3. The Substantiality of the Questions Presented in the Jurisdictional Statement Is Not Diminished by the Fact That Kansas Has Police Power to Regulate and Protect Its Water Resources

The Motion to Dismiss seeks to create the impression that all that is involved here is the power of the State of Kansas to regulate and protect its water resources. If that were true, there would be no litigation between these parties. The police power possessed by the State of Kansas does indeed justify reasonable regulation of such a natural resource in order to protect the public interest.

But when that police power is exercised in such a way as to destroy prior existing property rights without recognizing any entitlement to just compensation[4] and to create an unreasonable discrimination in terms of compensable rights as between natural beneficial users of water and artificial beneficial users, the Due Process and Equal Protection Clauses of the Fourteenth Amendment come into operation. The police power of a state, while it is wide in scope, is necessarily subject to the rights protected by the Fourteenth Amendment. *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U.S. 226, 240-241.

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[4] The critical conclusion of the Kansas Supreme Court was that "The suggestion that he has such rights in ground water underlying his land as must be acquired by eminent domain is untenable." 190 Kan. at 341.

As noted in the Jurisdictional Statement, pp. 13-18, Appellant's common law property right in the natural beneficial use of underground water was well established long prior to the adoption of the Water Appropriation Act. That right had been confirmed by the Kansas courts, by the Kansas legislature,[5] and by the repeated representations made to this Court by the State of Kansas in the prolonged Kansas-Colorado litigation. Significantly, the Appellee makes no effort to deny the relevancy or the impact of those representations that under Kansas law the proprietor of underground water, including that which is merely percolating, had such a property right as would permit him to enjoin unreasonable drainage from adjoining lands for merchandising purposes. See Jurisdictional Statement, p. 16.

The relevant decisions of this Court certainly do not indicate the insubstantiality of the questions arising from a legislative-judicial destruction of such a property right without just compensation. Quite the contrary. This Court has insisted time and again that the constitutional price for the destruction of vested property rights is the payment of just compensation.

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[5] The majority opinion of the Kansas Supreme Court made no reference whatever to the 1917 statute recognizing property rights in underground waters "for all purposes." Justice Schroeder's dissent, however, spoke of this statute in the following terms (190 Kan. at 363):

"In 1917 the legislature gave recognition to the common law in Kansas and declared '*underground waters for all purposes to become appurtenant to the lands under which they flow.*' (Emphasis added.) (L. 1917, Ch. 172, 6[d]). This legislation had the effect of settling the *vested property* rights of landowners in the Equus Beds to the water underlying their land."

The just compensation principle, this Court has said, was designed

> . . . to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Armstrong v. *United States,* 364 U.S. 40, 49. And to quote again from *United States* v. *Gerlach Live Stock Co.,* 339 U.S. 725, 753, there is no constitutional reason "why those who get the waters should be spared from making whole those from whom they are taken. Public interest requires appropriation; it does not require expropriation."

The effort of the Kansas legislature, as interpreted by the Kansas court, to deny the constitutional right of just compensation to this Appellant thus raises problems of the highest constitutional significance. The fact that this denial took the form of legislation interpreted to destroy retroactively a vested property right and the resulting right to just compensation for destruction of the property interest only underscores the substantiality of the questions. "A right so vested cannot be defeated by subsequent legislation," said this Court in *Ettor* v. *City of Tacoma,* 228 U.S. 148, 156. Or, as stated in *Calder* v. *Bull,* 3 Dall. 386, 388, a legislature cannot under our Constitution "violate the right of an antecedent lawful private contract; or the right of private property."

CONCLUSION

For these reasons, the Motion to Dismiss should be denied or ignored and probable jurisdiction of this appeal noted.

Respectfully submitted,

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